

APOLOGIA FOR JURISPRUDENCE

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WHILE it is important to remember that "law" consists of a large number of mutually contradictory symbols and ideals, it is equally important to realize that it requires for its acceptance a unified philosophy, which we will refer to as the "science of the law" or jurisprudence. An official admission by a judicial institution that it was moving in all directions at once in order to satisfy the conflicting emotional values of the people which it served would be unthinkable. It would have the same effect as if an actor interrupted the most moving scene of a play in order to explain to the audience that his real name was John Jones. The success of the play requires that an idea be made real to the audience. The success of the law as a unifying force depends on making emotionally significant the ideal of a government of law which is rational and scientific. Of course if we look at the moving, tumbling stream of events, evaluating the effects of the complex of habits, fears, hopes, social and economic pressures, we discover that "law" is not what it pretends to be. Yet if law did not pretend to be what it is not, it would lose its magic and effectiveness. This is a paradox only to those who refuse to think of the essentially dramatic character which every great public institution must develop. Functionally the primary purpose of the science of the law is to be a sounding board of both the prevalent hopes and the prevalent worries of those who believe in a government of law and not of men, to reconcile these hopes and worries somewhere in the mists of scholarship and learning, and never to admit that this is what it is doing.

The unifying principles which are behind all of the various activities of admittedly legal institutions are the concern of Jurisprudence. Its task is to prove that such principles exist, and to define them in general terms sufficiently broad so that all the little contradictory ideals appearing in the unending procession of particular cases will appear to be part of one great set of ideals. It succeeds in this task to-day when the resulting literature permits people to think that this is a government of laws and not of men. However, it must necessarily be different for dif-

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ferent times and for different people living in the same age. Its task is much simpler for an age that is willing to accept on faith that truth is revealed to judges from some mystical source beyond and above the light of reason. Perhaps in some future time which accepts "Experimentation" as the source of knowledge and is willing to trust in the personal expertness of judges, as to-day we trust in the expertness of physicians, Jurisprudence may again be simple. Yet neither faith in the notion that truth is revealed to judges, nor trust in the personal expertness of any individuals sitting as judges, is congenial to our ways of thinking to-day. We still think as Newton thought, as Blackstone thought, that our governmental institutions must be rational.

This way of thinking has its discomforts in a world which also reverences science. It compels us to assume that there is a separate faculty of the human mind called "reason," and another separate faculty called "will." This so-called "faculty theory" of psychology is no longer held by scientists. They, indeed, have a tendency to regard thought as only another form of behavior. Hence the rise of realists in juristic debate whose arguments are at the same time unanswerable and emotionally unacceptable because we have no formula to reconcile the attitude of the scientist with that of the theologian. Realists have their own principles and are quite willing to set up another kind of jurisprudence, but these principles do not assist us in setting up a logical heaven where Reason is enthroned. In a time when this sort of a heaven is demanded, realists cause spiritual discomfort. We cannot disagree with what they say because it is too obviously true. We can only tell them that he who points out facts and destroys old logical principles without substituting new ones of the same kind is not a "constructive" thinker. Man is the only animal that is ape to his dreams, and the dream which he demands to-day is that his government appear to be rational.

Thus, in spite of the impact of the ideas of matter-of-fact observers of our judicial system, the rational heaven of Blackstone still persists. Yet the number of ideas which must be included has so increased that to-day it is a very complicated heaven indeed. Science is recognized as a way of finding out the truth, so the law must find a rational place for science. Economics and sociology demand recognition. Psychology makes its claim. The law cannot ignore these ideas or these techniques. Neither can it assimilate them until they have been changed into rational principles.

The necessity of discovering a formula which will do this puts us in the midst of an unresolved mental conflict. Instinctively we feel that the law cannot exist without a separate faculty called "reason" which is divorced from another faculty called "emotion." We also feel that the science of law must not be blind to the discoveries of other sciences, which tell us that there is no separate faculty called "reason." One way

to reconcile these two contradictory ideas would be to admit that each had its usefulness, but that they must operate in different fields. The logical attitude is useful for the purely political purpose of making people feel that there was a rule of law above men, so long as such a feeling was necessary for the prestige of the legal institution. The scientific attitude is useful in order to study the folkways of the people and to determine what kind of formulae most appeal to them. However, this way of thinking violates the great idea that jurists must be "sincere." They must not be politicians, and they should not be permitted to advance theories for a purely practical purpose. Hence jurisprudence has been forced to supply the deficiencies of the rational process by applying more reason. Such conflicts always have the effect of producing an enormous amount of argumentative literature.

Twenty-five thousand printed decisions pour from our presses each year, with the hope that the limitations of the reasoning process can be cured by using more reason. The effect, however, is to make lawyers feel that the law is an unwieldy mass of single instances. Therefore, a great project is undertaken by the American Law Institute to restate the principles of these cases. Masses of decisions are reduced to proverbs in black-faced type, in the hope that lawyers will prefer the proverbs to the multitude of cases. However, the Restatement must above all things not depart from the general principles of case law. It cannot claim an authority greater than the decisions because that would make it appear like a code. Therefore the cases continue to pour out after the Restatement just as fast as they did before. Furthermore the Restatement must stand or fall only to the extent that it is correctly reasoned. This gives an opportunity for critics to write articles contradicting the Restatement, and these articles pour out after the Restatement even faster than they did before. Therefore, the available supply of legal literature becomes even greater and more cumbersome.

Attempts like the Restatement are probably the only way to make the separate decisions conform to the present unifying philosophy of law as long as our climate of opinion demands the application of more reasoning to cure the defects created by too much reasoning. In a measure the purpose is accomplished. Out of the whole confused effort comes the belief that a unified body of rational principles must exist, or else learned men would not be hunting for them with such untiring diligence. Present confusion is explained by showing that the law is an uncompleted science. The analogy of evolution, including the outworn scientific notion of the survival of the fittest, is employed. We are told that the inconsistencies between the ideals of jurisprudence are only temporary things in the march of progress, and that the real jurisprudence is just around the corner. Such a formula permits the scholars of jurisprudence to quarrel in peace, on the theory that out of such quar-

rels is coming the great reconciliation in which nothing worthwhile is abandoned. This is at least a partial explanation of why realistic thought about the law is always considered destructive, why attempts like the Johns Hopkins Institute of Law, designed to study the operation of the law rather than its formulae, fail for want of financial support, why even legal realists get caught in the prevailing attitudes and end by making their realism conform to an older way of thinking, why law schools which attempt a different method of approach usually are found to be teaching the same old subjects under different names, and finally why, when confronted with the large number of unorganized instances which make up the law in action, we throw up our hands and decide that it is "impractical" to examine practical things.

But the science of Jurisprudence must do more than reconcile the conflict between a scientific attitude and a logical attitude in favor of the latter. It must also give us a theology which permits us to believe that the various institutions which apply the law are doing it in a rational and uniform way in spite of all of the evidence to the contrary.

The institutions which partake wholly or partially of the solemn atmosphere of the law are varied. There is the appellate court, which gives us the raw data of 25,000 decisions a year to be reconciled. In addition there are legislatures, trial courts, administrative tribunals, executives, policemen, and lawyers, each playing entirely different roles, yet each supposed to be following the same principles of law. The existence of a science of jurisprudence is taken as proof that all of these institutions are performing parts of a common task. It enables us to lay down principles of what all these institutions ought to be doing, and from the platform of these principles to regard as temporary and unimportant what they actually are doing. The conceptions of "politics" and "human nature" are then called on to act as the devil in this theology. They are most useful as explanations of why the actual institutions do not more nearly correspond to the ideals of jurisprudence. However, "politics" and "human nature" though admittedly important factors in the conduct of judicial institutions are not considered worthy of study or examination in law schools. Everybody is supposed to know about them in a general way, but they are too disorderly to contain the sort of principles which can be formulated for the purpose of study.

In America we have, superimposed upon this hierarchy of institutions, an extremely specialized kind of law school which is torn between the desire to be practical and to be philosophical. Here we have the real home of the science of Jurisprudence. The faculties of law schools for the most part are men who have never practiced extensively, and who are not interested in the behavior of any legal institution except appellate courts. And since in appellate courts the practical difficulties of the trial court have already been rarefied by at least one degree of re-

moval, their further rarefaction in academic discussion makes the Law School an institution well adapted to reconcile the contradictory behavior of the various legal institutions into a rational unity, and to weave into a syllogistic design of pure intellectual beauty all the contradictory ideas which people have about the law. Thus the law school has come to symbolize the unifying principles necessary to make the judicial institution with all its complexity appear to be a government of abstract law. It is a guarantee to the public that somewhere, professors, separated from the confusing irrelevancies of a moving world, are working out a rational system which the world may some day follow. The public of course does not read the works of the professors. If it did, doubts might arise as to the efficiency of their efforts. It is enough for the public to have faith in institutions of legal learning as guarantees that principles, forgotten in the wickedness of a political world, are being constantly refined and made more useful for the world of tomorrow.

Social Pressure for an Abstract Science of Law

Since the role of the law school is to justify faith in an abstract science of law, it is natural that when this role is abandoned, social pressure appears which compels a return to it. Therefore law schools are for the most part conservative and conceptual in their thinking. There is of course much revolt. The ideas of objective science are constantly appearing in law school faculties and causing disquiet among believers. One of the vexed problems of legal science has been to absorb these ideas without changing the logical character of the science. The most frequent solution is to admit that these ideas are all true, but to deny that they have any part in the study of "law." In this the conservatives are aided by the temper of students who expect to find law to be something which they can take down in note books, and who do not wish to be confronted with the confused picture of what is actually going on. They do not object to new and realistic theories of law, as long as these can be formalized so that they can be taken into note books. They dread only the position of looking at the world before them without the aid of some one's theories. Hence "realism" in law schools tends to become only the same old jurisprudence with a new terminology. Professor Williston of Harvard remarked to the writer that the newer philosophy had resulted only in the same old courses with new names. This is probably true, and with the role assigned to the law school in the present climate of opinion it is difficult to see how it can be otherwise, since principles are so insistently demanded.

Thus men without a flair for spinning theory do not find a congenial atmosphere in our schools of law. And where professors rush out to

take part in the government which they are studying, social pressure is exerted to make them feel that the art of understanding government is destroyed by taking an active part in it. For example a prominent Yale alumnus voiced the sentiment of most of his brethren when he spoke as follows:

"Many unfortunate incidents would have been avoided during the past year and a half if professors had not gone to Washington heralded as representing this or that university, whereas they were really representing a minority of one. There is no reason why Yale should let one of these fellows go down there with the public assuming that he embodies all the learning at this University.

"It is not in the interests of our universities to have them running down to Washington *for they will never again be able to judge these problems in an unprejudiced light.*"¹

The pressure is also felt by the heads of the universities who must represent the institution to the public as fulfilling the function which our climate of opinion demands. President Hutchins of Chicago has always been one of our leaders in bringing to the law a scientific approach. Yet when he is put at the head of the University of Chicago he begins to realize the symbolic part which the law school of to-day must play. In a brilliant speech he reviews his former attempts to be scientific and realistic at the Yale Law School and comes to the following conclusions:

"We must, then, devote ourselves to legal research. But if the law is what the courts will do and we are going to be scientific we must get the cases, and the facts outside the cases, and the data of the social sciences. But when we get this material it is useless because we don't know what to do with it. It is a hopeless job anyway, because there is so much material that we can't possibly accumulate it all, and we have no basis for selections and discrimination.

"Now I put it to you that these dilemmas are the inevitable consequence of our notion of law and our conception of sciences. I do not deny that our definition of law and our conception of science are possible. I do assert that they are not complete and not fruitful for the study of law.

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"Now I suggest that if we are to understand the law we shall have to get another definition of it. I suggest that the law is a body of principles and rules developed in the light of the rational sciences of Ethics and Politics. The aim of Ethics and Politics is the good life. The aim of the Law is the same. Decisions of courts may be tested by their conformity to the rules of law. The rules may be tested by their conformity to legal principles. The principles may be tested by their consistency with one another and with the principles of Ethics and Politics.

1. Speech of Dean Acheson before Davenport College, Yale University. New Haven Register, Nov. 28, 1934.

"The duty of the legal scholar, therefore, is to develop the principles and rules which constitute the law. It is in short to formulate legal theory. Cases, facts outside the cases, the data of the social sciences will illustrate and confirm this theoretical construction. Where formerly they were worthless because we had no theoretical construction; where formerly we did not know what facts to look for or what to do with them when we got them; where formerly we could make no use of social scientists because neither they nor we had any mutual frame of reference which made material transferable, we may now see how all these things will assist our attempt to understand the law. We can even see how to tell whether cases are 'sound.'

"The concern of the law teacher and of the law student, as well as the legal scholar, is with principles."²

If President Hutchins had been referring to a medical school he would not have paraphrased his remarks on the law like this:

"We must then devote ourselves to medical research. But if medicine is a study of the reactions of individuals to germs and psychopathic states and we are going to be scientific we must get the cases, and the facts outside the cases, and even the data of the man's environment from the social sciences. But when we get this material it is useless because we don't know what to do with it. It is a hopeless job anyway because there is so much material that we can't possibly accumulate it all and we have no basis for selection and discrimination."

Such was indeed the attitude of the medical man at the time that the barber surgeon had the techniques and the physician the theory. To-day we find that those who hopelessly delved into the complex material that no one knew what to do with did perform a service. We have abandoned our notion of a "jurisprudence" of medicine. We no longer talk about the divine purpose of the various organs of the human body in an attempt to make it a logical and rational piece of construction.

We have paraphrased President Hutchins' remarks to bring into relief that the difference between law and medicine to-day simply consists in our different ways of thinking about them. This way of thinking about law puts certain limitations on legal and social education and makes it difficult for us admittedly to handle unrelated material and cases in the way of a medical scientist. It compels the search for a unifying principle in our schools and the discarding of whatever data cannot be reconciled with it. Whether we like it or not, Law Schools are maintained and endowed as centers of abstract thought. If they refuse to accept that role they are in an awkward political situation. If, however, they accept the medieval role which they are expected to play, much work of an entirely different character may be done within their walls. The jurisprudence of to-day does not explain the judicial system, but it is imperative this be not asserted in public. So long as the ways of thought

2. *Handbook of the Association of American Law Schools* (1933) 90-92.

of Blackstone are required to give morale to our governmental institutions, an open avowal of a different approach by the head of a university may cause so much public disquietude as to endanger both the training of students and the public esteem of the university itself.

A Definition of Jurisprudence

Thus we may describe jurisprudence or the science of the law in our present day as the effort to construct a logical heaven behind the courts, wherein contradictory ideals are made to seem consistent. Naturally the contradictions are reconciled in the only way logical contradictions can ever be reconciled, by giving each a separate sphere to work in, and pushing the inconsistencies back into the obscurity of great piles of books which are taken on faith and seldom read.

Since jurisprudence must necessarily include as its most vital part something lurking in the ultimate recesses of things, it follows that it is different for different classes of people. For the layman, the entire body of legal literature represents jurisprudence, because it is here that he thinks that the fundamental principles of the law have all been worked out to be revealed to him piecemeal in the occasional decision which comes to his attention. For the lawyer, jurisprudence is that part of the law which he never gets time to read—the part adorned with learned names like Austin, Jhering, Pound, which is separate from, and above the legal literature which he uses in court. He assumes that in this literature is found the bridge from one legal subject to another, the philosophy that law is a seamless web, that it is based on logical theories which are sound, that it governs society, that it is the product of ages of conscious thought consciously synthesized into a uniform system. The lawyer's attitude toward this voluminous literature is a mixture of condescension and respect. In private he is condescending and advises his son to stay away from courses labeled jurisprudence, because such intricacies form no part of a busy and successful life devoted to the law. Publicly he acknowledges the great need for more of such courses to give a broader viewpoint. He therefore sends his son to a law school which offers courses on jurisprudence on the theory that such courses have a good effect on the professors, and therefore in a general way make the school better. His attitude is like the attitude of the non-churchgoer toward the church, or like the attitude of the tired business man toward the opera. He is therefore willing to contribute financially to its support, and to endow chairs which enable the writers of jurisprudence to live in comparative affluence.

For the educator, jurisprudence is one of the things which makes the law learned, and thus distinguishes the law school from a mere trade school.

For the jurist, involved in the enormous literature of his subject, the vital part of jurisprudence is removed further into something which has not yet been written. He cannot deny the relevancy of ideals which are inconsistent with a rational explanation or theory of the law. Yet he has the very sound instinctive feeling that such realism is destructive of the moral sanction of the institution itself. He therefore regards the real jurisprudence as the work of men yet to appear upon the stage, who will synthesize the fundamental principle of a somewhat confused present. No one has better expressed this idea than Dean Pound.

"In many ways the present state of the legal order throughout the world suggests the sixteenth and seventeenth centuries. There is the same groping for new ideas and ideals. There is the same failure of authority with nothing as yet discovered to take its place. There is the same resort to personal justice, administrative tribunals, and sometimes crude individualized methods. There is the same chafing, on the one hand, at rule and form and, on the other hand, at a loose and unlimited judicial process.

"As the strict law gave us rule and form as a means to certainty and uniformity in the granting and applying of legal remedies, as equity and natural law gave us the idea of making conduct certain by insistence on reason and good faith, the nineteenth century gave us the system of individual legal rights as a means toward security, an end toward which the other means had been reaching. Thus each stage in the development of the modern legal order has left some permanent contribution, to which we have added others without losing them. *What the stage on which we seem to have entered will bring forth, it would be useless to conjecture. But we need not doubt that it will build on these achievements of the past.*"³

Thus we may finally define jurisprudence as the shining but unfulfilled dream of a world governed by reason. For some it lies buried in a system, the details of which they do not know. For some, familiar with the details of the system, it lies in the depth of an unread literature. For others, familiar with this literature, it lies in the hope of a future enlightenment. For all it is just around the corner.

An Analogy Between Law and Theology

It is sometimes possible to see the institutions of our own times better in the mirror of similar institutions of the past. Today the church seems tending toward a broad humanitarian ideal rather than a logical one. But a century ago, at least philosophically, it occupied much the same position as the judicial system does now. Theology was faced with the same problems as the law in so far as it was concerned with the proof of a moral and rational order, which was constantly contradicted by the world in action. Just as the Common Law repudiated the notion that

3. Roscoe Pound, *Law and the Science of Law in Recent Theories* (1934) 43 YALE L. J. 525, 535-536. (Italics ours).

there was any divine right behind its decrees, so the Protestant church abandoned the completely mystical basis of religion. Coke informed King James that there was a law above the King, the content and principles of which could only be discovered by reading legal literature and by years of training in a peculiar artificial reasoning which was different from ordinary reasoning. In the same way the Church was occupied with the rational proof of God by means of a science which was named theology. Both jurisprudence and Protestant theology arose from the demand for a rational explanation of a moral government. The problems of these two branches of learning are similar. Therefore their methods of inductive reasoning from analogy are similar. Both are the result of a craving for a moral order, logically supported. They persist because we are afraid to admit that the world is a highly irrational place, inhabited by people who are conditioned by emotional attitudes rather than led by reason.

This demand for a rational moral order is an attitude which we take only in our more solemn moments, and towards institutions which have a ceremonial significance. To define it is a dialectic task of great complication, and full of logical traps. It can better be understood if illustrations are given of conduct toward which we alternately take a rational moral point of view and a practical or humanitarian attitude.

For example we do not take a rational moral attitude toward insane people who commit crimes. The difficult question as to why a hopelessly insane person should be preserved at public expense when he is admittedly dangerous is never treated logically because it does not arouse our argumentative interest. When, however, we consider how to draw the line between the sane and the insane, we have a moral problem out of which arises the vast literature of criminal responsibility, which tries to reconcile the law, commonsense, psychiatry, and the procedure of a criminal trial into a harmonious whole. In the same way workmen's compensation has disappeared out of the courts into the practical atmosphere of administrative tribunals, and the dialectic literature of torts no longer applies. On the other hand we still retain the rational moral attitude as to the "scope of the employment," on which symbols pile up without end. Here the Court reappears and the parade of moral and logical argument commences.

These different attitudes operate in matters of general public interest in the same way as in the law. For example, during one of the worst winters of the depression the newspapers reported the eviction of a shanty colony from some vacant lots in order to make way for the erection of a building. The spectacle of poor hungry people driven from makeshift dwellings was pathetic, but nothing could be done about it. To give them a dole would establish a dangerous precedent contrary to the rational moral philosophy of rugged individualism. The evictions

of these unfortunates was therefore a symbol of a faith that economic competence can only be developed by refusing to protect incompetence.

After the work of demolition began two unconscious men were found under one of the improvised dwellings. Immediately a whole new set of attitudes and symbols rose as if by magic. Rational moral government ended and pure benevolence took charge. The idea that it was wrong to protect men from the results of their incompetence vanished. Twenty thousand dollars worth of ambulances, consuming an inordinate number of gallons of gasoline to the mile, clanged their way through crowded streets, manned by the most expensive nurses and internes that money could buy. The men were transferred to surroundings which in sanitation and equipment were beyond the reach of even the millionaire of fifty years ago. If a logically-minded individual had asked why so much money should be expended on individuals who would never be anything but a burden on society, and who would have to be turned out to suffer again after their stay in the hospital, he would have been simply brushed aside. Humanitarian ideals are not defined by logic. It was the duty of the ambulance to get the men to the hospital, not to discuss jurisprudence.

Thus a practical or humanitarian attitude develops techniques, and not logical arguments. A rational moral attitude develops philosophies, and priests, rather than technicians, and therefore the institutions which represent the rational moral attitude are the Law and the Church. If we turn to Bishop Butler writing in the 18th century, we see expressed as the ideal of the "Moral Government of God" the same notion which underlies our jurisprudence of to-day. We select Bishop Butler because he is typical of the logical thought of both the 18th century and the present day. He assumes that morals, like law, must have a rational and logical basis. He says:

"Moral government consists not barely in rewarding and punishing men for their actions, which the most tyrannical person may do; but in rewarding the righteous and punishing the wicked; in rendering to men according to their actions considered as good or evil. And the perfection of moral government consists in doing this with regard to all intelligent creatures in exact proportion to their merits and demerits."⁴

No clearer declaration of the objects of the "law" which is above man could be made. True, there are competing ideals. There is the "good of society," the promotion of trade, the necessity for general rules which raise havoc with the ethics of particular cases. However, if we read further in Bishop Butler's analogy we find that he is aware of the same competing ideals. Indeed in the next sentence he is faced with the most

4. JOSEPH BUTLER, *THE ANALOGY OF RELIGION, NATURAL AND REVEALED, TO THE CONSTITUTION AND COURSE OF NATURE* (20th ed. 1854) 64.

troublesome competing ideal of them all—the ideal of mercy, benevolence, individual equity because of peculiar circumstances of the particular case. And just as the legal theorist must reject that idea in favor of the sanctity of general unyielding principles to which the individual must sacrifice his petty personal concerns, so also must the Protestant theologian reject it. Bishop Butler does it in a purely legal way as follows:

"Some men seem to think the only character of the Author of nature to be that of simple absolute benevolence. This, considered as a principle of action, and infinite in degree, is a disposition to produce the greatest possible happiness without regard to persons' behavior, otherwise than as such regard would produce higher degrees of it. And supposing this to be the only character of God, veracity and justice in him would be nothing but benevolence conducted by wisdom. Now surely this ought not to be asserted unless it can be proved; for we should speak with cautious reverence upon such a subject. And whether it can be proved or no is not the thing here to be inquired into; but whether, in the constitution and conduct of the world, a righteous government be not discernibly planned out; which necessarily implies a righteous governor. There may possibly be in the creation of beings to whom the Author of nature manifests himself under this most amiable of all characters, this of infinite absolute benevolence; for it is the most amiable, supposing it not, as perhaps it is not, incompatible with justice; but he manifests himself to us under the character of a righteous governor. He may consistently with this be simply and absolutely benevolent, in the sense now explained; but he has, for he has given us a proof in the constitution and conduct of the world that he is, a governor over servants, as he rewards and punishes us for our actions. And in the constitution and conduct of it, he may also have given, besides the reason of the thing, and the natural presages of conscience, clear and distinct intimations that his government is righteous or moral; clear to such as think the nature of it deserving their attention; and yet not to every careless person who casts a transient reflection upon the subject."⁵

Thus, both Jurisprudence and Theology attempt to set up a moral government and to make that moral government rational. Both at the outset are confronted with the dilemma illustrated in the above quotation. Why not establish a government dedicated to the happiness of people rather than to rewarding and punishing them? Why not judge cases according to the fairness of the result between the particular individuals and the probable relative inconvenience which an adverse decision would cause to the parties? Why not take from the rich and give to the poor, at least to an extent which would not ruin the rich, regardless of whether the poor "deserve" such treatment?

Such questions place the humanitarian ideal in direct conflict with the moral ideal of government, and the moral ideal triumphs. Bishop

5. Ibid.

Butler explains this by saying that it would be illogical to consider God as illogical, and immoral to consider him immoral. The law gives a similar explanation in answer to humanitarian arguments which attack its rigid structure. If judges allowed their benevolent impulses to run away with their legal reasoning, we would have a bad law, which in the long run would produce less benevolent results. And in any event only an illogical person would advocate that law should be illogical. Such arguments expand into great literatures.

Thus we see that great conflict between rigid logic and loose benevolence is resolved in the same way by law and theology. At the outset we argue that we get more actual justice and benevolence by following logical rules, than by deliberately following our benevolent impulses. The latter is supposed to promote erratic conduct which would be less benevolent in the long run. Hence both jurisprudence and theology represent primarily logical, reasonable and universal rules, not to be distorted by the impact of kindly impulses in particular instances. After having proved this, we proceed to set up a separate institution representing benevolent ideals and logical ideals. In Theology this was represented by the Redeemer, who satisfied the sense of logic in the system by a purely personal sacrifice, and all the complicated structure of Milton's "Paradise Lost" to explain it. In Law we have the growth of courts of equity, which act on the person of the defendant, and restrain the enforcement of an otherwise valid judgment.

A mystical person who took the whole idea of supremacy of the law on faith, might combine both of these elements into one institution. The logical person must go through a more complicated process. First he must separate them so that they do not obviously conflict. Then he must put them together again to prove the law is a unit. This tendency to separate the two ideals and then to combine them produces most complicated results. We find for example, the Lord and the Redeemer separated, and then combined and then separated again in different creeds. We find separate courts of law and equity, faced with the bombardment of enraged rationalists who thunder the query, "How is it possible that a court of law needs to be supplemented by a court of justice?" Since we cannot conveniently answer this query the Code reform appears, and the distinction between courts of law and courts of equity is abolished. Yet the emotional need for a government which is moral and rational on the one hand, and benevolent and merciful on the other, still persists. Therefore the distinction is no sooner abolished than there arise those who say with profound conviction and eloquence that the distinction between law and equity can never be abolished, because it exists back in the nature of things, and truth crushed to earth must

necessarily rise again.⁶ As a matter of procedure, these people point out these two separate things may now be administered by one court but their separateness must be maintained by all judges who desire to preserve the sanctity of the law.

The confusion which has arisen is not the result of the stupidity of judges, as many contend, but the result of attempting to combine two conflicting symbols into one institution in a climate of opinion which demanded their separation. It is not difficult to tell the difference between law and equity when they are housed in separate buildings, because they can be defined by describing the building. When they issue from the same desk, the only way of establishing the distinction is by the rational process. But the distinction is inherently irrational. It neither arose, nor did it persist because of the deliberate reasoning of thinking men. Thus, for example, the task of keeping these two emotional attitudes apart in New York has led to the most peculiarly involved and incomprehensible body of supposedly logical doctrine that the literature of the law has yet produced.⁷ A never ending conflict of arguments keeps going on because of the never ending conflict between the ideals of a moral and benevolent government.⁸

The only way to end this argument is to stop thinking and talking about it, as has indeed occurred in the field of religion. There are signs

6. "The inherent and fundamental difference between actions at law and suits in equity cannot be ignored." *Jackson v. Strong*, 222 N. Y. 149, 154, 118 N. E. 512, 513 (1917).

"I need not dwell upon the disastrous consequences of the tendency above described, if it should go to its final stage. Even a partial loss of equity would be a fatal injury to the jurisprudence of a state. So far as equitable rules differ from those of the law, they are confessedly more just and righteous, and their disappearance would be a long step backward in the progress of civilization." POMEROY, *EQUITY JURISPRUDENCE* (4th ed. 1918) Preface, xiii.

7. "I would hazard the guess that the New York Code of Civil Procedure, which was enacted in 1848, has cost the people of the state of New York \$100,000,000, merely to find out what it means, through litigation over questions of procedure. There are scores of volumes in New York containing cases on nothing but points in procedure. Such litigation constitutes a vast social waste and is unjustifiable in an intelligent and civilized age. It ought to be possible to draw rules so that lawyers will know what to do without fighting interminably in the courts to find out whether they have done the right thing.

"The great tragedy of English jurisprudence was the divergence in procedure between law and equity. Two sets of courts were developed. There were two theories of parties. There were two methods of stating claims and defenses. There were two ways of dealing with proof. There were two agencies for trying issues. There were two kinds of review. No other nation but England and its English speaking heirs and assigns has ever suffered from such a burden. It was largely an historical accident, but it was ruinous in its consequences." Sunderland, *Observations on the Illinois Civil Practice Act* (1934) 28 ILL. L. REV. 861, 864-865.

8. As an example of the persistence of this view we find the recent Illinois code, passed in 1932, preserving the distinction conceptually while abolishing it procedurally. ILLINOIS CIVIL PRACTICE ACT ANNOTATED (1933) § 1.

to-day that this is happening in the case of Law and Equity. Nevertheless the same conflict of ideas appears on another battle ground. Law and equity have been joined together and we have become used to the notion. But the idea of law as a logical, certain, and moral body of rules still persists. Therefore when we wish to become practical we must create a separate tribunal. The court of equity is gone, but with its disappearance arises the administrative or quasi-judicial court endowed with the freedom of action which the old court of equity had. Huge treatises are now appearing showing the compatibility of administrative justice with the law. Just as theology was not able to exist without a Redeemer, so the "law" must have its equity or its administrative law in order to save mankind from the consequences of its logical systems.

Thus the great dialectic struggle to separate morals and reason from benevolence and then to bind them together rationally goes on. Both in law and theology we explain it in the same way. Equity or its equivalent must aid the law, not because "law" is imperfect but because the human mind, with its unfortunate capacity for sin, perverts the true logic so that some sort of intervention is necessary to set it back on its proper course. Though this has been reiterated over and over again by both jurists and theologians in their separate spheres, no better explanation has been given than is found in Butler's *Analogy*, written in the very midst of the age of reason, the 18th century, and representing a method of thought which is at the basis of the science of jurisprudence. Bishop Butler said in his chapter on "A Mediator and Redeemer":

"Upon the whole then, had the laws, the general laws of God's government, been permitted to operate without any interposition on our behalf, the future punishment, for aught we know to the contrary, or have any reason to think, must inevitably have followed, notwithstanding any thing we could have done to prevent it. Now,

"V. In this darkness, or this light of nature, call it which you please, revelation comes in; confirms every doubting fear, which could enter into the heart of man, concerning the future unprevented consequences of wickedness; supposes the world to be in a state of ruin, (a supposition which seems the very ground of the Christian dispensation, and which, if not proveable by reason, yet it is in no wise contrary to it); teaches us too, that the rules of divine government are such as not to admit of pardon immediately and directly upon repentance, or by the sole efficacy of it; but then teaches, at the same time, what nature might justly have hoped, that the moral government of the universe was not so rigid, but that there was room for an interposition to avert the fatal consequences of vice; which therefore by this means does admit of pardon."⁹

Nearly one hundred years afterwards, Albert Barnes of Philadelphia, in writing an essay on Butler, which was a paean of praise, put his finger

9. BUTLER, op. cit. *supra* note 4, at 185.

upon the most important element of the argument—an element equally important both in theology and jurisprudence. He said:

"We deem it a work of principles in theology,—a work to be appreciated only by those who think for themselves and who are willing to be at the trouble of carrying out these materials for thought into daily practical application to the thousand difficulties which beset the path of Christians in their own private reflections, in the facts which they encounter and in the innuendoes, jibes and blasphemies of individuals. *We know indeed that the work is intended to silence rather than convince, . . .*"¹⁰

Thus religion was compelled to have its logical God and its Redeemer and for the same reasons that law splits itself up into "law" and "equity", or "law" and "administrative law," through its attempt to be rational and consistent. However, these two elements are really one, as every good Christian or jurist must admit. There must be a unity on a higher plane. What is the element of unity? In seeking this element of unity we must rise to rarefied heights.

The church did it by inventing a conception called the Holy Ghost. Very few people completely understand the Holy Ghost. Most practical sermons left him out entirely. Nevertheless, in the more profound treatises of theological scholars we find grave discussions concerning this member of the Trinity. Practically no one ever read them, but everyone considered them important contributions for the general benefit of the ideological unification of the system. As a symbol of unity the Holy Ghost performed a very real, if somewhat vague function.

In the same way we find practical lawyers somewhat familiar with the separation of law and equity. The proof that they are both essentially one and at the same time essentially separate, aiding each other, and at the same time being part of "law" in general—this proof is found in that higher science of the law commonly called Jurisprudence. In this connection it takes almost exactly the same place as a symbol in the law which the Holy Ghost took in theology.

The same ways of logical thinking produce similar habits in writing. Just as there are almost one hundred law reviews to-day filled with unpaid-for and unread articles, so in the last century publication of tracts was at a premium, and the presses of the day were flooded with books of sermons and theological reasoning, like the modern law reviews devoted to patient exploration of argumentative possibilities. The ordinary practicing preacher probably did not read many of these tracts, just as it is almost unknown to-day to find a lawyer who reads the law reviews. However they were handy when he was writing his sermons,

10. Albert Barnes, *Review of Butler Analogy*, (Dec. 1830 and March 1831) QUART. CHRISTIAN SPECTATOR.

just as the law review to-day may be handy for the lawyer who is writing a brief. To-day these tracts are completely forgotten. Most of them are not even preserved in libraries. Yet if anyone takes the trouble to peruse them he will be astonished to find how similar is the tone and content to that of the modern law review.

The very names of the treatises sound like modern legal text books. For example "Bush on the Resurrection,"¹¹ Noble's "Plenary Inspiration,"¹² Perkins, "Cases on Conscience,"¹³ McCosh, "Method of the Divine Government,"¹⁴ Wits, "Oeconomy of the Covenants."¹⁵ If one opens these works he finds them divided like a brief into headings and subheadings, with proper footnotes and citations of authorities.¹⁶ And even more interesting is the fact that there is scarcely a dialectic problem which is discussed in the modern law school, of which one does not find at least a hint in the argumentative technique of the theology of the last

11. New York, Wiley & Putnam (1845).

12. (1839) Cincinnati, The Book Committee of the Western Convention (of the Episcopal Church).

13. (1636) London, Legatt.

14. (1880) New York, R. Carter & Bros.

15. (1798) New York, Forman.

16. The following is a typical example. The writer is discussing conflicting interpretations of *Judges XI:31*, which is Jephthah's vow.

"II. Such being the history of the four renderings, what is the present state of opinion on the subject?

"After such a commendation, by such a judge, in a book so well known, of Dr. Randolph's explanation; and after this had been adopted also in another well known work, Parkhurst's Hebrew Lexicon; one would have expected to find it received into all later comments on the Scriptures published in this country; yet this is far from being the fact. Even Horne, who in the Appendix to the first Volume of his 'Introduction,' offers short answers to the principal infidel objections, though he mentions Dr. Randolph's Sermon in a note, takes no notice of his solution of the difficulty, but gives an extract from Dr. Hales, who follows the *third* interpretation; being one of those which are so contemptuously spoken of by Dr. Lowth. Among the modern British annotators on the Bible, D'Oyley and Mant, Brown [last edition by Raffles], and Reeve, also advocate the *third* rendering. Scott honestly rejects this as not supported by the natural meaning of the words, and strenuously contends for the *second* rendering and the actual sacrifice. Dr. A. Clarke, after appearing to favour the *third*, abides, without naming Dr. Randolph, by *his*, or the *fourth* translation; but *as he gives it*, it is adapted to have little weight; since he does not notice the grammatical argument afforded by Buxtorf, which is its chief support; and, provided the Hebrew pronoun may be translated by the English *him*, he seems to think it of no consequence, whether that *him* answers to a dative or an accusative. Indeed, he here exhibits a strange hallucination, but little in accordance with the high attainments in Biblical literature, for which some give him credit. Randolph's or our *fourth* rendering, is expressly given by Hewlett alone. What is remarkable enough, D'Oyley and Mant give the practical reflections with which Randolph concludes his sermon, but take no notice of his explanation. Altogether it is evident, either that Dr. Randolph's view is hitherto but very partially known, or that it has met with but very partial approbation: I have not, however, seen anything urged expressly against it." NOBLE, PLENARY INSPIRATION (1839) app. xli.

century. The recurrent idea in most Western systems of jurisprudence that there is a constitution above the ordinary law is matched by the very definite idea that there is a law or set of principles even above God. For not even God himself could change the law which required man to be punished for his sins. Such a feat, done directly and without evasion would have indicated that God was illogical, that he was not operating a moral government—which, as Butler and nearly everyone that followed him for the next two hundred years pointed out, would have been both an immoral and an illogical assumption. Therefore the forgiveness of sins must be accomplished by a very elaborate indirection, by setting up an illogical institution alongside of a logical one, and reconciling the two logically.¹⁷ There is a constitution, and a plan above God, which is the only plan God could have made, since it is the best plan, and God is capable of following only the best plan, even though he has infinite free will. It is the best plan which was ever struck off by any religion, just as our constitution is the greatest document ever struck off by the mind or pen of man.

Even in details we find the limiting effect of this law above God. It is, for example, frequently pointed out in sermons of fifty years ago that on the day of final judgment everyone must be present. Without everyone present God would lack something very similar to what we refer to in the law as jurisdiction. Everyone is a necessary and indispensable party to the proceedings of final judgment. It is more or less fundamental that while misjoinder is not necessarily fatal to the writ, nonjoinder will require the dismissal of the bill. God is no more able to escape this principle than a common-law judge.

The great problem of certainty in a changing world is reconciled in the same way both in an older theology and a modern jurisprudence. Man must be free to sin—otherwise the whole moral structure crumbles. At the same time God must be able to predict the results of the exercise of this free will, otherwise God would not be omnipotent. Therefore although man had a free choice not to sin, God knew when he created him that he was going to sin. Our legal structure is along somewhat

17. "The constitution of the world, and God's natural government over it, is all mystery, as much as the Christian dispensation. Yet under the first, he has given men all things pertaining to life; and under the other, all things pertaining unto godliness. And it may be added, that there is nothing hard to be accounted for in any of the common precepts of Christianity; though, if there were, surely a divine command is abundantly sufficient to lay us under the strongest obligations to obedience. But the fact is, that the reasons of all the Christian precepts are evident. Positive institutions are manifestly necessary to keep up and propagate religion amongst mankind. And our duty to Christ, the internal and external worship of him; this part of the religion of the gospel manifestly arises out of what he has done and suffered, his authority and dominion, and the relation which he is revealed to stand in to us." BUTLER, *supra* note 4, Pt. II, c. 5 on A Mediator and Redeemer.

the same lines. By virtue of careful scholarship and restatement we have made the law so certain that properly trained lawyers can tell it in advance. Yet man must be free to select improperly trained lawyers, to advise him, for what would become of our rugged individualism in the face of state controlled legal services. However, even though we know in advance that improperly trained lawyers will be selected, we feel comfortable about punishing litigants for their mistakes because they must take the consequences of their free choice between good and evil.

Just as in theology, the devil of jurisprudence ranges all the way from a person to an abstraction, depending upon where he appears. Generally the devil is "ignorance," who can only be exorcised by "education." The solution to nearly all legal problems is therefore a better trained bar, and a better trained judiciary. This solution can be reached after a process of oratory, or after a process of statistical research. Since we started out to establish and improve a moral government, there is no possibility of avoiding the invention of a personal devil to explain away the lack of improvement. Thus we find the Wickersham commission giving as their solution of the problem of prosecution, the elimination of politics from the selection of prosecuting officers.¹⁸ This is a typical solution of any problem studied from the moral or logical point of view, regardless of whether the method is ancient and mystical, or modern and statistical. In improving a system assumed to be moral, put your finger on the immoral element and exorcise it. In improving a system assumed to be logical, locate the illogicality, and point out to an abstraction known as "the American people" or "we" or "you," the absolute necessity of getting rid of it. Thus the "bar" must be alive to the necessity of improving procedure. "Judges" must recognize how imperative it is to "enforce" the law. "The people" must be told to take politics out of government, etc. In theology this is called preaching. In law it is usually referred to as education and reform. However, actually it is a very necessary reconciliation of the conflict between the ideal of moral and logical government and its competing attitudes. It has nothing to do with education, but much to do with making people more comfortable.

The most frequently appearing personal devil in the law is known as the shyster. When dealing with concrete problems, such as are created

18. "But certain recommendations, applicable generally to substantially all the States pointing out the lines to be followed in attempts to better local systems of prosecution, are entirely feasible. There should be:

(1) Elimination, so far as may be possible in our system of government, of political considerations in the selection and appointment of Federal district attorneys and prosecuting officers and of appointments based upon political activity or service." NAT. COMM. ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION (1931) 37.

by the fact that there is no adequate legal service for the poor person who has a claim for personal injury, it is obviously most inconvenient to vested rights and established institutions legislatively to provide for adequate representation. It is much easier to set our minds at rest by proving that the evils are not the result of the system, but the result of certain evil-minded individuals operating within the system. It is not usual to single them out. It is sufficient to point out the duty of the bar to rid itself of shysters. The public criticising the system should keep in mind that it is operating on the correct principle in not coddling the poor, and that the minor problem of the "shyster" is the subject of the eternal vigilance of the profession.

Such ideas, expressed in simple form among bar associations, when subjected to analysis and dialectic attack, retreat behind the impressive defenses of the Science of Jurisprudence—just as when one started with an attack on any current inadequacy of the Church, he always became lost sooner or later in the complications of theology. This however is only another way of saying that moral and rational dialectics are not the tools by which social change is effected. Instead they are the methods of reconciling deep-seated conflicts in the shadowy ideals found in a common culture. Argumentative attack, if the emotional need for the institution is strong, does not change the institution; instead it complicates its jurisprudence or its theology, until the attack is deflected and loses its force in a maze of learning. Social change, is usually the result of indirection, of the change of meaning of symbols without anyone quite realizing when the change took place. It is usually more hindered than helped by direct argumentative attack on the theology of the existing institution.

Given the necessity of justifying a moral and logical government, shared in common by both law and theology, the dialectic is necessarily similar even as to detail, because there are only a few permutations and combinations possible in this situation. Take for example the matter of the great struggle between code and common-law pleading—a struggle between the ideal of a dignified and formal presentation of a case, and the ideal that substance and justice are the real factor, and the form is therefore immaterial. This conflict has never been, nor will it ever be completely reconciled, so long as pleading has any symbolic significance in the system. It is only in the so-called administrative bodies, where pleadings are not "jurisdictional," where there is no "science" of pleading, that we escape pleading difficulties. We do it simply by changing our attitude and treating the matter practically instead of ritualistically.

Turn back to 1850, when the logical justification of what the church did was as important to it as the logical justification of the law is to-day,

when theological seminaries were the homes of careful thought about detail, when theological tracts poured out as law review articles do to-day, and we find the same struggle, with the same answers. Code pleading is represented by the Presbyterian Church, which presented only the operative facts in stating its cause of action to the deity. The forms of prayers, like the forms of action, had been abolished. Common-law pleading was represented by the Episcopal Church, with its liturgy. We quote from a former member of the Princeton theological seminary, who had seen the light, who says:

"I know it from their own lips, that many of the Presbyterian clergy in this country admit, feel, and among themselves deplore the vacuum which the loss of a Liturgy has left, and would gladly restore written form, if the downward tendencies of the system and the times allowed; a form not, indeed, to be invariably binding, this would be incompatible with their ideals of liberty and gifts and inspiration; but to be of discretionary use and of occasional obligation."¹⁹

Nor could any devotee of common law forms more adequately describe code pleading as he conceived it than the following description of non-liturgical prayers: "... their irreverent familiarity; their cold and wordy emptiness; their forced ejaculations; their sluggish drawl; the thousand blemishes, defects, redundancies, extravagancies of their off hand homage . . ."²⁰

The writer then goes on to catalogue 26 defects of public petitions to the deity. Just as in pleading these defects range from those which might be called "jurisdictional," that is, of the sort which makes the thing labeled as a prayer really not a prayer at all, "which omit some essential element of devotion such as the confession of sin, the act of faith, the offering of thanks, the oblation of alms, the recognition of the Holy Trinity, even the mention of the name of Jesus"²¹ to defects of inaccuracy, presumption, raising political questions, bombast, verbosity, etc.²²

The writer then proceeds to show that the liturgy is not only the best way of avoiding those defects and obtaining proper devotional petitions, but it is the only system which is historically sound, or fundamentally in accord with principle. If we compare this essay to one written in defense of the Presbyterian method we find both sides of the so-called

19. A PRESBYTERIAN CLERGYMAN LOOKING FOR THE CHURCH, BY ONE OF THREE HUNDRED (New York, 1850) 115.

20. *Id.* at 116.

21. *Id.* at 120.

22. Defective prayers are classified by the writer as follows: Doctrinal, Historical, Hortatory, Denunciatory, Personal, Sectarian, UnEnglish, Verbose, Unforgiving, Theatrical, Inaccurate, Bombastic, Declamatory, Objurgatory, Presumptuous, Political. *Id.* at 116-122. Such defects arise from the abandonment of the liturgy.

controversy between code and common-law pleadings express. The problem of reconciling two conflicting ideals, both of them valid, without entirely losing either was the same as the pleading problem to-day. Neither in the Church nor in the Law, was it really a question of the effectiveness of the petitions. The controversy and the literature surrounding it arose from the need of the simultaneous recognition of the idea of common sense and simplicity, with the ideal of learned and dignified form, which required a special and artificial sort of a skill to prepare.

The dangers of the abandonment of precedent in pleading is illustrated by the same author in a way which should be familiar to any sound legal scholar to-day. Speaking of the spiritual results of the abandonment of a formal prayer book he says:

"Nor would this be so terrific a result of Presbytery, if the 'Evangelical' clergy of Germany, of whom one here and there is to be found, gave hope of a brighter day. But Luther himself bequeathed to them the dangerous precedent of setting the Scripture itself aside, when it stood in the way of some favorite opinion. . . . The German Evangelical Clergy, still profiting by the courage of the master, are able, by a dash of the pen to settle, on the basis of 'private judgment' the canon of Scripture which the whole Catholic Church was cautiously substantiating for three hundred years."²³

And finally, just as the law to-day is constantly filled with downward tendencies due to the failure of its disciples to follow fundamental constitutional principles, and to the lack of worry which a misguided people is giving to that abandonment, so the church in 1850 suffered from the same ills. Not even Mr. James Beck, talking on the constitutionality of the New Deal can do better than this:

"And, in doctrinal theology, almost afraid that my very thoughts should be overheard, I yet thought within myself, Where do we stand. 'Original sin is an original absurdity'—'Imputed righteousness is imputed nonsense'—'Natural inability makes sin a natural misfortune, but certainly not sin' [etc., etc. for two pages and then]:

"These and numberless like propositions, continued I to myself, emanating from the Edwardses, the Beechers, the Barnses, the Skinners, the Emmonses, the Hopkinses of Presbytery, have within my own brief recollection become the absorbing themes of our pulpits, our schools of theology, and in the absence of a Liturgy, of our very prayers. The old school, or Orthodox Presbyterians, occupying themselves for the most part the doubtful and slippery ground of the New Lights of the last generation are awhile in doubt whether they can rally in sufficient strength to excind their unsound brethren, or whether they shall be driven to secession as the only escape from evils under

23. *Id.* at 155.

which the body is groaning. The crisis comes. The Church is rent. Heresies multiply."²⁴

There is a real trouble and worry here about the disturbance of old symbols, just as there is to-day about the constitution. The book in which the above appeared was published by a committee, and went through several editions. The committee considered this sort of thing very necessary propaganda for the welfare of the entire nation. Its actual unimportance is about the same as the actual unimportance of the worry about constitutional symbols among conservative lawyers to-day, their fear of bureaucracy, their mutterings about communism. Yet the book became part of the current literature of theology because it expressed the worry about changes in symbols which is the essence of the attitude of both the law and the church. Thus Mr. Justice McReynolds in the recent gold clause decision, expressing his distress because the constitution was being construed liberally by his colleagues, begins his dissenting opinion as follows: "To let oneself slide down the easy slope offered by the course of events and to dull one's mind against the extent of the danger, . . . that is precisely to fail in one's obligation of responsibility," and closes with the phrase, "the impending legal and moral chaos is appalling."²⁵

The rational theology has become one of the forgotten arts. The questions which eager seekers after the truth used to ask of the ecclesiastical pedagogues have not been answered, but they are no longer asked. The vast literature which formed such an imposing rational facade to the Protestant faith is falling into ruins through neglect and disuse. More purely humanitarian and benevolent attitudes seem to prevail. Preachers are rated according to their ability to organize, and to exhort, rather than on the closeness of their reasoning. A separate science of theology in the most modern seminaries has not the importance which it once had.

24. *Id.* at 166-168. The title of the chapter is "Downward Tendency." Cf. JAMES M. BECK, *THE CONSTITUTION OF THE UNITED STATES* (1922) 165-166, where the author says:

"Lest I be accused of undue pessimism, let me cite as a witness one who, of all men, is probably best equipped to express an opinion upon the moral state of the world. I refer to the venerable head of that religious organization* which, with its trained representatives in every part of the world, is probably better informed as to its spiritual state than any other organization.

"Speaking last Christmas Eve, in an address to the College of Cardinals, the venerable Pontiff gave expression to an estimate of present conditions which should have attracted far greater attention than it apparently did.

"The Pope said that five plagues were now afflicting humanity. The first was the unprecedented challenge to authority."

25. *Norman v. Baltimore & Ohio Rr. Co.*, 55 Sup. Ct. 407, 419, 427 (1935).

*Reference is to the late Pope Benedict XV.

The science of jurisprudence to-day is going through somewhat the same struggle which the church experienced when it was shaken by the realism of the modernists. In the Church that controversy was never decided. Men simply ceased to worry about it. It may be that men will simply cease to worry about jurisprudence. However, one desiring to indulge in prediction along this line should not forget that the heat of dialectic argument in the church did not die down until the church had lost most of its importance as a governing force. Before the American Revolution the church was even the repository of the law, and its power over local government was always felt. Later it had in its peculiar charge that most important institution, the college. Losing this, it still was preeminent in the field of charity. To-day it occupies a rather precarious place in our social life. Interest in its theology has died down as the activities of the institution itself have become narrowed.

A similar result in law, however, seems unlikely unless the Judicial system is to lose its prestige, or unless the faculty of "reason" is to take a less important place in the hierarchy of ideals. So long as our belief in rational moral government depends upon the law, it must continue to balance logically the contradictory ideals which that government must express. In a climate of opinion where the ultimate appeal is to reason the constant succession of ideological contradictions developed by reason when applied to practical problems can only be settled by the application of a higher reason. The result is Jurisprudence.

In the science of Jurisprudence all of the various ideals which are significant to the man on the street must be given a place. It must prove that the law is certain and at the same time elastic; that it is just, yet benevolent, economic; yet morally logical. It must show that the law can be dignified and solemn and at the same time efficient, universal and fundamental, and at the same time a set of particular directions. Jurisprudence must give a place to all of the economic, and also the ethical notions of important competing groups within our society, no matter how far apart these notions may be. In its method it must make gestures of recognition to the techniques of each separate branch of learning which claims to have any relation with the conduct of individuals, no matter how different these techniques may be.

Such a task can only be accomplished by ceremony, and hence the writings of jurisprudence should be considered as ceremonial observances rather than as scientific observations. This is shown by the fact that the literature of jurisprudence performs its social task most effectively for those who encourage it, praise it, but do not read it. For those who study it to-day it is nothing but a troubling mass of conflicting ideas. However it is not generally read, so that its troubles are

known only to the few people who read it for the purpose of writing more of it. For most of those who reverence the law the knowledge that there is a constant search going on for logical principles is sufficient.

Of course if the point of view from which this article is written should become generally accepted these statements would no longer be true. However, as we will attempt to show later, the pragmatic utility of a purely objective point of view is very limited. It is useful for the purpose of finding out how institutions work. It may form the basis of a technique of therapeutics. But to expect that it will take the place of faiths and ceremonies, even for those who on occasion may avail themselves of it, is to misunderstand the way of man in society.